GOH KANG SIA & ANOR

v.

HASIAH MD ISA

HIGH COURT MALAYA, PULAU PINANG
RK NATHAN J
[CIVIL APPEAL NO: 12-120-2003]
1 SEPTEMBER 2004

TORT: *Negligence - Road accident - Collision between motorcycle and motorbus - Liability - Contributory negligence - Whether deceased contributed to accident - Whether defendants fully liable*

ROAD TRAFFIC: *Negligence - Collision between motorcycle and motorbus - Apportionment of liability - Whether deceased contributed to accident - Whether defendants fully liable*

CIVIL PROCEDURE: *Judgments and orders - Revision - Appeal against decision of sessions judge - No cross-appeal - Whether High Court had right to review decision - Courts of Judicature Act 1964, s. 33*

This was the defendants' appeal against the decision of the learned sessions judge finding them 70% liable for a road accident resulting in the death of the deceased. The plaintiff had sued as the mother and dependant of the deceased against the defendants, the 1st defendant being the owner and the 2nd defendant being the driver of the motorbus at the material time that the collision with the motorcycle driven by the deceased had occurred. The learned sessions judge had found, based on the damages to the motorcycle and the evidence of an eyewitness, the deceased's colleague ('SP4'), that the deceased had been speeding and had therefore contributed to the extent of 30% to the accident. The plaintiff contended that, on the date of the accident, as her son was proceeding along Jalan Sultan Azlan from the direction of Jalan Tengah towards the direction of Bayan Lepas, the deceased or his motorcycle was collided into by the motorbus which had suddenly and without warning emerged onto the road and into the deceased's path from a factory gate, leading into the factories situated at FTZ Fasa 1 which said gate was on the left of the road as one faces Bayan Lepas. The defendants, whilst admitting the collision, denied all the rest of the allegations. They specifically denied that the bus was driven out of a gate on the left, and also averred that the deceased had failed to slow

down and/or brake upon seeing the signal given by the driver of his intention to make a 'U' turn by the side of the road, or that the deceased had failed to brake upon seeing the motorbus making a 'U' turn.

Held (dismissing the defendants' appeal):

[1] Even though there had been no cross-appeal by the plaintiff, by virtue of s. 33 of the Courts of Judicature Act 1964, this court had the right to review the issue of liability and revise a particular decision, if necessary, to secure that substantial justice was done. (p 438 e-f)

[2] From the evidence of an independent witness, the 2nd defendant did emerge from the gate. The learned sessions judge had erred when she held that it was not important for the court to conclude whether the 2nd defendant had emerged from the gate, as this was the crux of the plaintiff's case which the defendants had vehemently denied. An eyewitness testified that the gate was only meant for vehicles and buses to enter into the FTZ Fasa 1 area where all the factories were situated. The defendants' failure to show that vehicles could go in and come out of that gate meant the only evidence before the court was that the 2nd defendant had no business coming out of a no-exit gate. (pp 439 f-h & 440 a-e)

[3] The 2nd defendant said that as he moved from the left lane to the right lane, he saw the light of the motorcycle some 50-60 feet away, and it was on the right lane. Obviously, he must have encroached into the deceased's path all of a sudden because according to him as soon as he had moved about 10 feet, the collision occurred. Since there was no observation in relation to the deceased's speed, it could not be proved that he was speeding. As soon as the 2nd defendant had encroached 10 feet into the deceased's path, the front of the motorcycle collided into the rear wheel and the body of the bus, just above the rear wheel. (p 441 a-d)

[4] The 2nd defendant tried to explain his negligence by saying that the deceased was on the left lane. Yet he was never asked in re-examination to explain why all along during the examination-in-chief and cross-examination, he had said that the defendant was on the right lane. (p 441 e)

[5] Looking at the damage to the motorcycle, there was nothing to show that the deceased had contributed to the accident occurring. Further, the evidence tendered by SP4 that the deceased was speeding could not be held against the deceased because SP4 was not competent to assess the speed of the deceased's motorcycle. (pp 441 g & 442 a-b)

[6] Having discounted both the reasons given by the lower court for finding the deceased as having contributed, this court set aside the finding of contribution of 30% against the deceased and instead held the defendant driver 100% liable. (p 442 c)

Case(s) referred to:
Chan Sia Hock v. C & C Group Sdn Bhd & Anor [1998] 5 CLJ 123 HC ***(foll)***
Chu Kim Sing & Anor v. Abd Razak Amin [1999] 4 CLJ 448 HC ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 29, 33, 34, 69(5)
Evidence Act 1950, s. 114(g)
Rules of the High Court 1980, O. 55 r. 3

For the appellants/defendants - AJ Teoh; M/s AJ Teoh & Co
For the respondent/plaintiff - En Ramanathan; M/s Ram Pillai & Assoc

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

Facts

The plaintiff/respondent sued as the mother and dependant of one Zamani bin Hassan, the deceased rider of motorcycle PDH 3209. The 1st defendant/appellant was the owner and the 2nd defendant/appellant the driver of motor bus PV 8503 at the material time.

In her statement of claim the plaintiff contended that on 2 October 1996 at about 6.15am as her son was proceeding along Jalan Sultan Azlan Shah from the direction of Jalan Tengah towards the direction of Bayan Lepas, the deceased or his motorcycle was collided into by the motor bus which suddenly and without warning emerged onto the road and into the deceased's path from a factory gate, leading into the factories situated at FTZ Fasa 1 which said gate was on the left of the road as one faces Bayan Lepas.

In their defence whilst admitting the collision, the defendants denied all the rest of the allegations. They specifically denied that the bus was driven out of a gate on the left. In their particulars of negligence pleaded against the deceased, the defendants contended that the deceased failed to slow down and or brake upon seeing the signal given by the driver of his intention to make a 'U' turn by the side of the road. Another of the particulars was that the deceased failed to brake or stop upon seeing the bus making a 'U' turn. It would be important to remember these two particulars of pleaded negligence as the evidence would subsequently show.

The Evidence

The plaintiff called as her witnesses both the Inspector and the Sergeant who investigated this case. The sergeant described the damages to the bus as having occurred just above the right rear tyre whereby the body of the bus was broken. As for the motorcycle the front left fork was bent and the front head lamp was broken. Further the petrol tank and the engine were also broken. He drew the key and sketch and had photographs taken. The sergeant confirmed that from the bus driver's police report he gathered that the driver had stated that he had come from the roundabout at Bayan Baru. He also confirmed that on the left of the road as one faces Bayan Lepas there was a gate leading to the factories at FTZ. In fact he identified a photograph, out of the many taken, as showing the gate to the factories. He also confirmed that the place where a person could make a 'U' turn was very far from the scene of the accident. If it was close he would have shown it in his sketch plan.

The next witness was SP4. He was the eye-witness to the accident. He testified that he knew the deceased. They both worked in the same factory. That night both he and the deceased worked at the same shift. That morning they were both proceeding along the said road in the direction of Bayan Lepas. There were three lanes on the said road. He was on the extreme left lane whilst the deceased who was riding ahead of him, was on the centre lane. Suddenly he noticed a bus emerging from a gate from the left and encroaching into the deceased's path. It was the rear right tyre that was encroaching into the deceased's path. He noticed the bus emerging from a gate which was only meant for vehicles entering the premises and not meant for vehicles to come out onto the main road. At that moment he was about 60 meters from the bus. There were street lights on the road at that time and they were on. He even identified through the photographs the gate from which the bus emerged. After the collision he rendered assistance.

He gave a statement to the police about a month later because he did not know that he ought to have lodged a police report. It was the deceased's brother who urged him to give the statement.

Under cross-examination he confirmed that he had been out at nights with the deceased for meals and that they were close to one another.

He felt that the deceased would have been equally anxious as he was to get back home after a long shift and would have been speeding like he was. He reiterated under cross-examination that the gate from which the bus emerged was actually meant for vehicles going in and not meant for vehicles to come onto the road. When it was put to him that that could not have happened because of the security guard at the gate, he said that only at times there was a guard at the gate. This gate was meant as the entrance for all factories at FTZ Fasa 1. At the defence request he marked as Y the place from where the bus had emerged, and this is shown as a point on the left edge of the road, a short distance from where the bus had finally stopped. The bus crossed from the first lane to the second lane. However when the collision occurred the rear right tyre was encroaching and obstructing the deceased who was then on the third lane. When the wheel so obstructed the path of the motorcycle in an oblique position, the front of the motorcycle collided into the rear right of the bus near the tyre. He witnessed this collision occurring about 60 meters in front of him. After the impact, the deceased was flung across the divider and landed onto the other side of the road. It was also ironic that the deceased's brother, who was at that moment travelling from the opposite direction, had to see his brother's body lying on the road.

He denied the defence suggestion that his evidence was merely to support the plaintiff's case since he was a friend of the deceased. He did not know the deceased's brother earlier. The deceased's brother looked for him at his place of work.

He also denied the defence suggestion that the bus could not have emerged from the gate since there was a guard there.

Under re-examination he confirmed that his speed was 50 kilometers per hour whilst the deceased was riding faster than him. When the bus encroached, he saw the deceased attempting to swerve to the right to avoid the collision.

The next witness for the plaintiff was the deceased's elder brother. He confirmed that on the eventful day he was proceeding from the opposite direction and on seeing a crowd he stopped and saw his brother dead on the road. No vehicle wanted to stop to take his brother to the hospital, until a passing lorry took his brother to the hospital and he followed on his motorcycle.

He had never met SP4 before. After the accident he went to his brother's factory and enquired if there were witnesses since someone on the same shift could have seen the accident. His friends at the factory told him that SP4 had witnessed the accident and that was how he had gone to SP4's house and got him as a witness.

The defendant testified that that morning he had left his house at Green Lane and was proceeding towards Gelugor by way of Jalan Sultan Azlan Shah with the intention of going to a factory to bring back workers. To go to this factory at Bayan Lepas he had to proceed along Jalan Sultan Azlan Shah and then make a 'U' turn. He was then on the centre lane and since he intended to make a 'U' turn he moved to the right lane. When he was about 50 feet from the place where the 'U' turn was, he gave a right hand signal of his intention to move to the right lane. At the same time he looked to the rear. He noticed a motorcycle light coming from the rear. At the next breadth even during his examination in chief he changed his story and said that when he gave his right hand signal he was 300 meters from the place where the 'U' turn was situated. He then moved slowly to the right and soon after he had moved about 10 feet he heard the sound of a collision coming from the rear. When the motorcycle collided into his bus he was then about 60 feet from the place where the 'U' turn was situated. He denied he had emerged from the gate on the left.

Under cross-examination he named his employer as one Teoh Teik Seng. He noticed the motorcycle coming from the rear some distance away through the mirror on the right, before he moved to the right lane. This distance he estimated at 50-60 feet. After the collision he moved forward to a distance of 20 feet before stopping. He had stopped about 60 feet from the place where the 'U' turn was situated.

However under further cross-examination he admitted that the place where he stopped after the collision was in fact about 800 feet from the place where the 'U' turn was situated. He also admitted that although he saw the light of the motorcycle on the right lane, yet he moved towards that

lane after giving his signal. In the next breadth he said, possibly after realising what he had said, that he did not know if the motorcycle was on the right lane. Then under persistent cross-examination, he again admitted that before the collision the motorcycle was indeed on the right lane. Whilst admitting that there were factories situated along the left side of the said road he denied emerging from a gate on the left. When he was shown the pleadings in which he had alleged that the collision had occurred when he was making the 'U' turn, he admitted that that was not correct. He clarified by saying that what he had meant was that he had entered into the right lane to make a 'U' turn, about 800 feet away from where the 'U' turn was situated.

Under re-examination he came out with a fresh position of the motorcyclist. This time he said he saw the motorcycle on the left lane when he was beginning to move to the right lane.

At the close of the defendants' evidence counsel for the defendants sought an adjournment to have the driver's employer in court to show that he had no reason to come out of the gate on the left as alleged by the plaintiff's witness but that the driver was indeed proceeding to another factory to bring home workers. On the day this case was refixed for hearing, Mr. Teoh for the defendants informed the court that the employer was unable to attend as he was unwell. No medical certificate was tendered. The court however adjourned the case for another three months. There were many more postponements for various reasons. The court then fixed a final hearing date. Again the case was adjourned as counsel for the defendants was at the Alor Setar High Court. Finally after more than a year's adjournment, counsel for the defence closed his case. He gave no reason why he did not wish to call the defendant employer after having the case adjourned for more than a year.

Can This Court Review The Issue Of Liability

Half way through hearing submissions, I adjourned the case and invited both counsel to address the court as to whether this court could, on the available evidence, review the findings of liability even though there had been no cross-appeal by counsel for the respondents.

Mr. Teoh for the appellants referred me to s. 34 of the Courts of Judicature Act 1964 which reads as follows:

34 No revision at instance of party who could have appealed.

Where an appeal lies from any decision in any civil matter, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of a party who could have appealed.

He therefore argued that there was no provision for this court to revise, since the respondent who had the opportunity to cross-appeal, had failed to do so.

I do not think s. 34 is applicable to the present situation. Here the respondent has not sought the revision. If the respondent, having missed out on time, then sought to have a second bite at the cherry by seeking a revision, I am of the view, s. 34 would apply and preclude the respondent from seeking a revision since she ought to have cross-appealed.

I am of the view that in the present situation where the court on its own initiative had sought to review liability, then the proper section to refer to is s. 33 of the Courts of Judicature Act 1964 and it reads as follows:

33 Powers of High Court on revision of civil proceedings

In the case of any civil proceedings in subordinate court the record of which has been called for, or which otherwise comes to its knowledge, the High Court may give such orders thereon, either by directing a new trial or otherwise, as seems necessary to secure that substantial justice is done.

It is my judgment that the operative words "or which otherwise comes to its knowledge" give this court the right to review the issue of liability. This court has become otherwise aware of the facts by way of this appeal. The same section also provides that this court can revise if it seems necessary to secure that substantial justice is done.

In *Chan Sia Hock v. C & C Group Sdn Bhd & Anor* [1998] 5 CLJ 123 Ian Chin J was of the view that notwithstanding the want of a notice of cross-appeal under O. 55 r. 3 Rules of the High Court 1980, it is nevertheless in the interest of justice, if there is any error in the decision of a lower court, that such error be corrected notwithstanding the failure to give any notice of cross-appeal. This power is derived by the High Court from s. 29 of the Courts of Judicature Act 1964 read together with s. 69(5) of the said Act. His Lordship then went under s. 29 of the Courts of Judicature Act 1964 which reads as follows:

29 Civil appeals to be by way of re-hearing

All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court.

He applied the provision of s. 29 together with s. 69(5) of the same Act which reads as follows:

69 Hearing of appeals

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

In *Chu Kim Sing & Anor v. Abd. Razak Amin* [1999] 4 CLJ 448 Abdul Malik Ishak J held that the awards for the personal injuries sustained could be increased by the appellate court notwithstanding the fact that the respondent did not cross-appeal with regard to quantum. By challenging the apportionment of liability and quantum decided by the trial court, the appellants had reopened the questions of liability and quantum.

Whilst in neither of the two cases cited, the issue of revision had been raised I am fortified in my view that this court can review any decision since an appeal is indeed by way of a re-hearing. Having decided that I have the power to re-look at the apportionment of liability, I now will look at the available evidence.

Findings Of This Court

It is obvious from the evidence of the bus driver that he was prevaricating. I find from the evidence of the independent witness that the bus driver did indeed emerge from the gate. I come to this conclusion on the following grounds:

(a) It is admitted that there is a gate leading to all the factories on the left side of the said road;

(b) When asked to show his direction on the sketch as he moved to the right lane, the driver drew a dotted arrow at a tangent from the left to the right lane;

(c) The damages to the bus were over the right rear wheel and not at the rear of the bus clearly indicating that the bus was in an oblique position by cutting across the path of the motorcycle when the motorcycle collided into the bus;

(d) Having said he would call his employer to court to show that he had no business coming out of the gate and that he was indeed going straight on and then wanting to make a 'U' turn 800 feet away, he failed to call this employer and failed to give any reasons for his absence. Surely this is a classic instance to invoke s. 114(g) of the Evidence Act 1950 against the defendants.

The learned Sessions Judge erred when she held that it was not important for the court to conclude whether the defendant indeed did emerge from the gate. The lower court ought to have made a finding on this issue since this was the crux of the plaintiff's case and vehemently denied by the defendants.

Having thus satisfied myself that the defendant bus driver did indeed come out of the gate, the next issue is was he allowed to do so. The eye-witness testified that that gate was only meant for vehicles and buses to enter into the FTZ Fasa 1 area where all the factories are situated. The case was adjourned many times during the defence stage. Surely at least in rebuttal the defendants could have subpoenaed the management that controlled the gate to at least testify that vehicles could go in and come out of that gate. This was not done and the only evidence before me now is that the bus driver had no business coming out of a no-exit gate.

It is important to look into the evidence of the driver. He changed his version so many times as to when he switched lanes. Initially he said he was 50 feet from the place where the 'U' turn was when he gave the right signal and moved to the right lane. Immediately thereafter he said when he gave the signal and turned to the right he was 300 meters from the 'U' turn because there was a signboard showing 300 meters. As soon as he had moved for 10 feet he heard the collision. Then he said when the collision occurred he was 60 feet from the 'U' turn. Then under further cross-examination he said he stopped about 800 feet from the 'U' turn after the collision. I must also not forget the pleadings wherein the defendants had averred that the collision occurred when the driver was making a 'U' turn.

It is easy to fathom what really happened. The defendant said that as he moved from the left lane to the right lane, he saw the light of the motorcycle some 50-60 feet away and it was on the right lane. Obviously he must have encroached into the deceased path all of a sudden because according to him as soon as he had moved about 10 feet, the collision occurred. The deceased was getting home after a long night shift. Whilst the eye-witness said his speed was 50-60 kilometers per hour, he also said the deceased was riding faster. He was never asked how he was able to assess the deceased's speed. Speed is relative. To some even a normal speed, would be construed as speeding. Since there is no observance in relation to the deceased's speed I cannot hold that the deceased was speeding.

The deceased was on the right lane. Suddenly this bus driver emerges from the gate and cuts across his path presenting the rear wheel. The motorcycle was then 50-60 feet away on the admitted evidence of the bus driver. As soon as he had encroached 10 feet into the deceased's path the front of the motorcycle collided into the rear wheel and the body of the bus, just above the rear wheel.

The bus driver tried to explain his negligence by saying in re-examination that the deceased was on the left lane. Yet he was never asked in re-examination to explain why all along during the examination in chief and during the cross-examination he had said that the deceased was on the right lane.

Having found the defendant bus driver liable I now have to see if the learned Sessions Judge was correct in finding the deceased rider contributory to the extent of 30%. She found, based on the damage to the motorcycle and on the evidence of SP4 that the deceased was speeding, that the deceased had contributed.

Looking at the damage to the motorcycle which I had recorded earlier, there is nothing to show the deceased had contributed. At least if the defendants had engaged a motor engineer who could testify, by looking at the damage to the motorcycle, as to the speed of the motorcycle at the time of the collision, there would have been a basis for the court to find contribution.

The next issue is the allegation that the deceased was speeding. As I had said earlier, the evidence of SP4 that the deceased was speeding, cannot be held against the deceased because SP4 was not competent to assess the speed of the deceased's motorcycle. If the deceased was going faster than him, then he could not have been able to keep the deceased within his vision. At worst the deceased's speed might have been equal to his. That was why he did not catch up with the deceased but followed him at a distance.

Having discounted both the reasons given by the lower court for finding the deceased as having contributed, I therefore set aside the finding of contribution of 30% against the deceased and hold the defendant driver 100% liable.

In the circumstances the defendants' appeal against the finding of 70% against them is automatically dismissed. I also award costs to the respondent.